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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 335

R. H. WRIGHT, INC., and ROBERT J. HUMMEL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

RICHARD M. WHITE,
SHUTTS, BOWEN, SIMMONS, PREVATT & BOUREAU,
1010 First National Bank Building,
Miami 32, Florida,

THOMAS H. ANDERSON,
ANDERSON & NADEAU,
1126 First National Bank Building,
Miami 32, Florida,
Attorneys for Petitioners.

F. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Petition for Writ of Certiorari 1

I. The Information Did Not Contain Sufficient Allegations That Bitumen Remained in the Flow of Commerce 3

II. The Information Did Not Sufficiently Allege That Shipments Were Made in Anticipation of Demand 10

III. The Information Did Not Sufficiently Allege the Existence of Prior Orders 13

Conclusion 16

Appendix—

Title 15, U.S.C.—Commerce and Trade, §1 ..... A1

Opinion of the United States Court of Appeals for the Fifth Circuit A3

Table of Cases

A. L. A. Schechter Poultry Corporation v. *United States*, 295 U.S. 495, 543 8

Brosious v. *Pepsi-Cola Co.*, (C.A. 3rd, 1945) 155 F.2d 99 12

Clem v. *State*, 33 Ind. 418 4

Ewing-Von Allman Dairy Co. v. *C and C Ice Cream Co.*, (C.A. 6th, 1940) 109 F.2d 898 9

Foster & Kleiser Co. v. *Special Site Sign Co.*, (C.A. 9th, 1936) 85 F.2d 742 13

Industrial Ass'n of San Francisco v. *United States*, 268 U.S. 64, 78 8

Jewel Tea Co. v. *Williams*, (C.A. 10th, 1941) 118 F.2d 202, 207 ..... 11, 12

Kirschbaum Co. v. *Walling*, 316 U.S. 517, 520 14

Lipson v. *Socony Vacuum Corporation*, (C.A. 1st, 1937) 87 F.2d 265, 267 12

Mandeville Island Farms, Inc., v. *American Crystal Sugar Co.*, 334 U.S. 219 10

McJunkin v. *Richfield Oil Corporation*, (D.C. N.D. Cal. 1940) 33 F. Supp. 466, 469 4

State v. *Wines*, 47 N.J. Super. 235. 135 A.2d 543 4

United States v. *Chrysler Corp.*, (C.A. 9th, 1950) 180 F.2d 557 15

United States v. *Starlite Drive-In, Inc.*, (C.A. 7th, 1953) 204 F.2d 419, 420 ..... 5, 10

Walling v. *Jacksonville Paper Co.*, 317 U.S. 564 ..... 6, 13, 14

AUTHORITIES

Criminal Rule 7(c) 6

Toulmin's Anti-Trust Laws, Vol. 6, Sec. 12.26 4

15 U.S.C., §1, 26 Stat. 209, Ch. 647 ..... 2, 3

28 U.S.C. 1254(1) 2

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PETITION FOR WRIT OF CERTIORARI

R. H. WRIGHT, INC., a Florida corporation, and ROBERT J. HUMMEL petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing the judgment of the United States District Court for the Southern District of Florida. The opinion of the Court of Appeals is appended hereto and is reported in 329 F.2d 860.

The judgment of the Court of Appeals was dated March 26, 1964. A petition for rehearing, timely filed, was denied on June 10, 1964, and the issuance of a mandate was stayed for ninety days in order to permit petitioners to apply for certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The question presented for review is whether the purchase of imported bitumen and its processing, storage and subsequent resale by local asphalt producers constitutes a transaction in interstate or foreign commerce within the scope of Ch. 647, 26 Stat. 209, 15 U.S.C. §1.

The statute which the case involves is set forth in the appendix.

The United States informed against R. H. Wright, Inc., South Florida Asphalt Company and East Coast Asphalt Corp., all Florida corporations, and an officer of each charging them with conspiring to restrain interstate and foreign trade in the sale and distribution of asphalt material. It was charged that substantial quantities of bitumen are purchased by wholesale distributors from foreign and out-of-state petroleum companies for re-sale; that tanker loads are regularly scheduled for shipment every four to six weeks to deep water ports in Florida; that it is delivered to temporary storage facilities into which it is pumped from the tankers and then transported by common carriers to defendants. The information also charged that the petroleum companies regularly contact the suppliers for the purpose of soliciting orders and that substantial quantities are shipped in anticipation of current supplier demand. From this the conclusion was stated that the defendants acted as conduits through which bitumen flowed in a continuous stream in foreign and interstate commerce from Venezuela and states other than Florida to its final use as a paving surface for streets, roads and driveways in Broward County, Florida.

The District Court dismissed the information holding that it failed to charge the defendants with having made

any contracts in restraint of trade or commerce within the meaning of Title 15, U.S.C. §1 (R. 88-89).

The Court of Appeals reversed, saying (R. 14-15):

> "In our opinion the information under consideration sufficiently alleged that the bitumen was shipped with a definite knowledge and understanding on the part of the producers that the defendants would purchase the same, the approximate amount that would be purchased, and approximately when such purchases would take place. Even if such shipments were not in response to direct orders from the defendants, the arrangements and understandings alleged were sufficient."

The reasons why the writ should be granted are 1) that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court in that this Court has not held that the transactions set forth in the information are within the terms of the anti-trust laws. 2) That the decisions of this Court on the few cases comparable to this indicate that the Court of Appeals' decision is in conflict with pronouncements of this Court. In virtually all such cases the nexus which justified the holding consisted in some actual concert of action analogous to the passing of buckets of water by a fire brigade.

These statements are better demonstrated by a consideration of the information and cases.

I.

The Information Did Not Contain Sufficient Allegations That Bitumen Remained in the Flow of Commerce.

Paragraph 12 of the information (R. 12) alleged that substantial quantities of bitumen are shipped by producers in Venezuela in direct response to orders, understand-

ings or commitments by asphalt suppliers to purchase bitumen in connection with paving projects in Broward County, and in Paragraph 14 that the suppliers (meaning the local dealers) act as conduits from which the bitumen flowed in a continuous uninterrupted stream from Venezuela to the final use of the bitumen in paving surfaces in Broward County. These paragraphs begin with the word "Thus." "Thus" means "so"; "consequently"; "therefore." *Clem* v. *State*, 33 Ind. 418; *State* v. *Wines*, 47 N.J. Super. 235, 135 A.2d 543.

Accordingly, the two paragraphs around which the case is built allege, in effect, that as a result of the preceding allegations, the conclusion follows that the shipments were made in response to orders, understandings or commitments and also that the bitumen flowed in a continuous, uninterrupted stream of foreign commerce.

Therefore, these paragraphs must be considered as conclusions of the pleader and being so they are not admitted by the motions to dismiss.

In an indictment under the Sherman Act it is not sufficient to allege as a conclusion that the combination was in restraint of trade. The details must be given so as to show in what manner interstate commerce or trade was restrained. *Toulmin's Anti-Trust Laws*, Vol. 6, Sec. 12.26.

In *McJunkin* v. *Richfield Oil Corporation*, (D.C. N.D. Cal., 1940) 33 F. Supp. 466, 469, the operator of a gasoline station brought suit against the oil company, alleging a conspiracy to fix prices resulting in damages to the plaintiff. In holding that the complaint failed to state a cause of action, the Court said:

> "The complaint, it is true, states that the acts complained of were done in violation of the Sherman Act. But such an allegation, even under the liberal-

ized rules of pleading in effect since the adoption of the new Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c, cannot take the place of allegations from which it can be determined whether or not the law mentioned was in fact violated. No one would seriously contend that a complaint alleging merely that the defendant violated the Sherman Act to plaintiff's damage, would be sufficient. Neither can it be seriously contended that a complaint is sufficient which alleges merely that the defendants violated the Sherman Act in certain specified particulars which do not themselves show all the elements necessary to constitute a violation thereunder. That is the situation in this case. This action is wholly statutory and it is essential to the jurisdiction of the court that a substantial cause of action within the statute be set up by a 'short and plain statement of the claim showing that the pleader is entitled to relief.' Rule 8 (a) (2), Federal Rules of Civil Procedure."

In *United States* v. *Starlite Drive-In, Inc.*, (C.A. 7th, 1953) 204 F.2d 419, 420, the Government appealed from an order dismissing an indictment charging violations of the Sherman Act. This case is particularly persuasive "because the order was entered after oral argument, during which the District Judge expressed the view that the indictment was faulty for failure to factually allege that interstate commerce was directly affected." In affirming the judgment, the Court said:

> "The substance of defendants' argument is that the 'effects' thus alleged are mere conclusions of the pleader, without basis in the factual allegations. Such being the case, the allegations entitled 'effects' are not admitted by the motion to dismiss. We agree with this reasoning. Whether the indictment states an offense must be determined from the allegations of fact, that is, whether the agreement or combination fixing uniform prices for admission under the circumstances alleged constitutes an anti-trust violation."

The information has also other formal defects. In Paragraph 8 (R. 10) it alleges that the bitumen imported into the state was transferred to temporary storage facilities which are owned and operated by the producers and refiners "or by their terminal agents." The alternative allegations suggest that the agents may own the storage facilities in a proprietary capacity in which case the transition could not constitute a "convenient step" in the transportation.

The information is also vague and obscure in its charges (R. 11) that the bitumen is shipped to Port Everglades as a result of "orders, understandings and commitments."

Also in Paragraph 13 (R. 12) it is charged that the remaining shipments were based on "anticipation of current supplier demand, orders to be received and sales to be made."

These allegations violate Criminal Rule 7(c) which provides that the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

The petitioners are entitled to know what factual matters they are to meet at the trial. To say that a given result flowed from orders, understandings or commitments and that shipments are based on anticipation of current supplier demand, orders to be received and sales to be made is not sufficient under the rule. Obviously, if Venezuelan shipments are made upon "orders to be received" in Port Everglades, there is no possible contractual relationship on which to base a claim that the goods flowed in interstate commerce such as appeared in the *Jacksonville Paper Company* case, *infra*, heavily relied upon by the Government.

The information in this case is vague, indefinite and ambiguous. It is destitute of any clear and concise statement of facts out of which the charges arose and the allegations are *not* admitted by the motion to dismiss.

To establish continuity, it is argued that the storage in Port Everglades was a "convenient step." The bitumen was not ordered by the petitioners, who were charged with the violation, but it was shipped into Port Everglades upon the order of the oil companies and was there stored awaiting such time as purchases were to be made by the asphalt manufacturers. There were no sale contracts involved and the asphalt manufacturers simply ordered bitumen from the oil companies as was required by their needs. Upon the order being placed, the bitumen was sold by the oil companies and delivered to the particular asphalt manufacturer. Following delivery the bitumen was mixed with aggregates and otherwise subjected to a manufacturing process by the purchaser. The finished product was then sold to any contractor who might care to order for his own use.

The whole process described in the information lacked continuity from the time the bitumen was first placed in the storage tanks at Port Everglades. There was a definite break in the flow of the bitumen once it reached the storage tanks and there was no certainty as to when the bitumen would be used, by whom it would be used, or how it would be used.

The Court below apparently treated the case as though the bitumen was like an airline passenger who, en route to his destination, is required to stop-over to await a connecting plane. This comparison would be useful except for the fact that the person who emplanes at Maracaibo is not the same one who ultimately leaves Wright's plant in

Fort Lauderdale. The tankload of bitumen which Wright buys from the terminal company at Port Everglades is not sold to the former's customers. What is sold is a different substance known as hot mix asphalt.

If the Court's position is sound then all commodities coming into the United States from foreign countries never lose their foreign-commerce character regardless of when they come to rest within the state, regardless of the fact that they never thereafter leave the state, and regardless of the fact that they lose their original identity. Here there was no continuity. The lack of it affirmatively appears from the face of the information.

In *Industrial Ass'n of San Francisco* v. *United States*, 268 U.S. 64, 78, the Court said:

> "It is true, however, that plaster, in large measure produced in other states and shipped into California, was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended."

In *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, 543, Chief Justice Hughes said:

> "The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a '*current*' or '*flow*' of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as

the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here." (Emphasis by the Court)

In *Ewing-Von Allman Dairy Co.* v. *C and C Ice Cream Co.*, (C.A. 6th, 1940) 109 F.2d 898, a private action for damages, a judgment for the plaintiff was reversed. The dairy company manufactured and sold its entire output to an affiliate nationalized ice cream company, which, in turn, sold and distributed to retail dealers in Louisville, Kentucky. C and C was a retailer of ice cream in the area. The appellee alleged a violation of the Sherman Act. The sole question before the court on appeal was whether or not the appellants were subject to the Act. The opinion shows that the bulk of the raw ingredients used in the manufacture of ice cream cones came from Kentucky, but that the gelatin, fruits, flavoring and a portion of the milk which went into the manufacture of the ice cream came from outside the state. In reversing the judgment for the appellee, the Court said:

"We do not regard the transactions complained of as creating a direct and substantial burden on interstate commerce. The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky. The sales in appellants' retail stores were entirely of a local nature, made after all transportation, local and interstate, had ceased, and were beyond the regu-

latory power of Congress over interstate commerce. Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 F.2d 742. Competition between the parties in Louisville and Jefferson County in no way affected interstate commerce, and the record contains no proof of conspiracy to restrain such commerce. Lipson v. Socony Vacuum Corp., 1 Cir., 85 F.2d 265."

In *U. S.* v. *Starlite Drive-In, Inc.*, (C.A. 7th, 1953) 204 F.2d 419, 422, the Court discussed the *Mandeville-Sugar* case, *infra*,* relied on by the Court below, and in the course of its opinion said:

> "* * * Neither this case nor any other, however, supports the theory advanced here that local activities are illegal simply because they concern articles which have previously moved in interstate commerce. Nor do they hold that a price-fixing agreement between local retailers dealing in a product produced in another state is illegal in the absence of a specific showing of the effect of the conspiracy on interstate commerce."

The hot mix asphalt, the result of the subsequent manufacturing process, was sold to paving contractors wholly within the Broward County area. Therefore, the petitioners' operations were local in character, were not in interstate commerce, and were not subject to the Sherman Act.

II.

The Information Did Not Sufficiently Allege That Shipments Were Made in Anticipation of Demand.

Every person in business anticipates demand; otherwise, no one would have need for inventories. The petroleum importer maintained an inventory of petroleum in

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*Mandeville Island Farms, Inc., v. American Crystal Sugar Co., 334 U.S. 219

the terminal agent's storage tanks at Port Everglades. R. H. Wright, Inc., maintained an inventory of hot mix asphalt at its plant in Fort Lauderdale. The former constituted a stock of goods of the oil company. Such stock remained in the storage tanks and was withdrawn for delivery only upon receipt of orders. Cargoes of petroleum were discharged on regular schedules. If such fact made the stream of commerce continuous within the Commerce Clause, then Federal jurisdiction is unlimited.

When the bitumen was sold and delivered, it took on, by the manufacturing process, a new identity. The time when it was to be processed, how it was to be processed and sold was subject to the judgment and whim of the manufacturer. When the manufacturing process was completed the finished product was sold only in the Broward County area.

In *Jewel Tea Co.* v. *Williams*, (C.A. 10th, 1941) 118 F.2d 202, 207, the Court said:

> " 'Where goods are ordered and shipped in interstate commerce to meet the *anticipated demands* of customers without a specific order therefor from the customer and the goods come to rest in a warehouse, the interstate commerce ceases when the goods come to rest in the state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer.' "

Anticipation must be predicated upon more than hope, both as to time and quantity. If the idea of anticipated demands contended for by the Government to establish the existence of interstate commerce, based on hope rather than existing orders, were to prevail, it would virtually mean that if goods were once shipped in interstate commerce, then they would never lose their interstate char-

acter and thereby extend the scope of governmental regulation and control to every facet of American business.

The *Jewel Tea Company* case was followed in *Brosious* v. *Pepsi-Cola Co.*, (C.A. 3rd, 1945) 155 F.2d 99, which was an action for treble damages under the Sherman Act. Pepsi-Cola manufactured a concentrate or syrup which was shipped in containers from Long Island, New York to Pennsylvania. The concentrate was warehoused until mixed and bottled as the trade demanded through jobbers, salesmen or distributors. At the conclusion of the plaintiff's case the trial court granted a motion to dismiss.

In holding that the defendant had the right to sell to whom it chose, the Court quoted from *Jewel Tea Company*, saying:

> "When a substance is transported from one state into another, the interstate movement ends with the delivery of that substance to a distributing company. Subsequent sales and deliveries to customers of such company constitute intrastate commerce."

A similar contention as to the continuous flow and the effect of anticipated demand was made in *Lipson* v. *Socony Vacuum Corporation*, (C.A. 1st, 1937) 87 F.2d 265, 267. In affirming a judgment sustaining a motion to dismiss the complaint, the Court said:

> "(1) We are unable to agree that, as set forth in paragraph 11 of the amended declaration, the plaintiff has alleged with substantial certainty that, owing to what it terms a continuous flow of gasoline, all gasoline brought into the northeastern territory by the defendants remains in interstate commerce until it is delivered into the storage tanks of the retailer. While it is clear that the defendants must keep a supply on hand in their storage tanks to meet the fluctuations of demands of the retailers, an anticipated

demand by retail customers is not sufficient to render shipments a transaction in the course of interstate commerce until delivered to the customer whenever a demand arises. The cases which hold an order or contract for goods which necessitates a shipment in interstate commerce, and that interstate commerce continues until delivered to the customer, do not apply to anticipated demands. We do not think the Supreme Court has gone so far as to hold that, to meet the anticipated demands of customers without a specific contract therefor, interstate commerce continues until the demand eventuates in the form of an order or contract and the merchandise is delivered to the retailer."

See also *Foster & Kleiser Co.* v. *Special Site Sign Co.*, (C.A. 9th, 1936) 85 F.2d 742.

III.

The Information Did Not Sufficiently Allege the Existence of Prior Orders.

The Court below said:

"In our opinion the information under consideration sufficiently alleged that the bitumen was shipped with a definite knowledge and understanding on the part of the producers that the defendants would purchase the same, the approximate amount that would be purchased, and approximately when such purchases would take place. Even if such shipments were not in response to direct orders from the defendants, the arrangements and understandings alleged were sufficient."

Reliance is placed on *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. This is not a Sherman Act but a Wage and

Hour decision.* However, there is nothing in the decision to support the Court's decision. Here the sole issue was whether in the case of a wholesale paper distributor which delivered goods to customers in a number of states the act applied to employees at seven branch houses which, though constantly receiving merchandise in interstate shipments and distributing it to these customers, did not ship or deliver any of it across state lines. Significantly, some of the merchandise was shipped directly from the mills to the Paper Company's customers.

In its opinion, the Court said:

> "Certainly they (the two types of transactions) cannot be distinguished from the special orders which respondent receives from its customers. Here also, a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer 'in commerce.'"

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*At Text 569 the Court said that in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 520, it had stated that decisions dealing with Federal powers in the commerce field are not particularly helpful in Fair Labor Standard cases.

United States v. *Chrysler Corp.*, (C.A. 9th 1950) 180 F.2d 557, also relied on, is likewise out of point. Essentially the indictment charged Chrysler Corporation, which manufactured replacement parts in several states, with shipping these parts to its wholesalers in Washington who, in turn, resold the parts to garages, repair shops and others. It was further alleged that "(a)t various specified times and places the defendants (evidently meaning all of them) have successfully combined and conspired to raise and fix wholesale prices on parts by specified percentages, to decrease and fix wholesale discounts on parts by special percentages, and to compel authorized dealers to adhere to the prices and discounts so fixed." Obviously this arrangement could not have been made without the actual participation of the manufacturer who was unquestionably engaged in interstate commerce.

In order for the case at bar to be analogous to the *Chrysler Corporation* case the information would have had to charge that the Venezuelan producer (the Shell Oil Company) had conspired with Wright to fix the price of hot mix asphalt on sales to contractors. This the information does not do.

The information alleges (R. 11) that when contracts are awarded for asphalt materials for public and private paving projects in Broward County, the agents of the petroleum companies or their distributors communicate with the suppliers "for the purpose of soliciting or otherwise obtaining orders, understandings or commitments to purchase the bitumen required by such projects."

It then charges that such "understandings or commitments include a determination of the quantity of bitumen needed" on the project as well as "the construction timetable in order to schedule shipments * * * to meet the future requirements."

This allegation in the information is completely contradictory of the allegation in the preceding paragraph (11) that tanker loads of bitumen are "regularly scheduled for shipment and delivery every four to six weeks to the aforesaid deep water ports in Florida."

If the producers maintain a regular schedule for the shipment of bitumen from Venezuela to Florida deep water ports, including Port Everglades, how can it be said that they solicit orders for the purpose of knowing how much bitumen to deliver?

This allegation of fact in the information overrides the contention that shipments are made to Port Everglades on prior orders from R. H. Wright, Inc.

As to *Mandeville Farms, supra,* the facts are so different as to destroy the case as an analogue.

CONCLUSION.

The information wholly failed to charge a criminal violation of the Sherman Act and the District Court's judgment was correct. The opinion and judgment of the Court of Appeals should be quashed.

Respectfully submitted,

RICHARD M. WHITE,

THOMAS H. ANDERSON,
SHUTTS, BOWEN, SIMMONS, PREVATT & BOUREAU,
1010 First National Bank Building,
Miami 32, Florida,
ANDERSON & NADEAU,
1126 First National Bank Building,
Miami 32, Florida,
Attorneys for Appellants.